MICHIGAN
LAW REVIEW

VOL. XXI DECEMBER, 1922 No. 2

PROCEDURE AND PRACTICE BEFORE THE FEDERAL TRADE COMMISSION

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THE Federal Trade Commission, now in its eighth year, has successfully withstood the attacks, judicial and political, which threatened at times to destroy it, or, at least, to render it impotent. The act creating it has been held constitutional[1]; its powers and duties have been defined[2]; the present administration has indorsed it; and the public have come to realize its power for good. As its activities have expanded its influence has become definitely felt by the business world. The increasing interest of both business men and members of the profession warrants a brief exposition of the practice before the Commission, and the methods used in performing its functions.

The Commission was created and empowered by the Federal Trade Commission Act (Sept. 26, 1914, c. 311, 38 Stat. 717); its powers and duties were greatly enlarged by the Clayton Act (Oct. 15, 1914, c. 323, 38 Stat. 730); its jurisdiction was extended to export trade by the Webb Act (April 10, 1918, c. 50, §§ 3-5, 40 Stat. 517), and its jurisdiction restricted by the recent Packers and

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[1] Sears, Roebuck & Co. v. Federal Trade Commission, 258 Fed. 307; T. C. Hurst & Sons v. Federal Trade Commission, 268 Fed. 874; National Harness Mfrs. Assn. v. Federal Trade Commission, 268 Fed. 705; Federal Trade Commission v. Beechnut Pkg. Co., 42 Sup. Ct. 150.

[2] Federal Trade Commission v. Gratz, 253 U. S. 421; Federal Trade Commission v. Beechnut Pkg. Co., 42 Sup. Ct. 150; Federal Trade Commission v. Winsted Hosiery Co., 42 Sup. Ct. 384.

Stockyards Act (Aug. 15, 1921, c. 64, 42 Stat. 159). In addition to the above, the Commission, by Executive Order of Oct. 12, 1917, was vested by the President with certain powers and duties under the Trading with the Enemy Act (Oct. 6, 1917, c. 106, 40 Stat. 411). The Commission also exercised certain war time functions in connection with the Department of Justice, Food Administration, War Industries Board, Fuel Administration, War Trade Board, Shipping Board, and the Army and Navy Departments.

To understand the procedure before the Commission, and the method of exercising its powers and performing its duties, one must first consider the organization of the Commission, itself. The personnel and work of the Commission are divided as follows: The Administrative Division; The Legal Division; The Economic Division; The Export Trade Division; The Enemy Trade Division.

The Administrative Division has charge of appropriations and expenditures, personnel, and stenographic and clerical services. It also includes the Publications Section, by which the Commission's official decisions, reports and bulletins are issued, and the Docket Section, in which all official records of the Legal Division are filed.

The Legal Division is entrusted with the enforcement of the provisions of law above referred to. It is divided into two sections, under the Chief Counsel and the Chief Examiner, respectively. The Chief Counsel is the chief law officer of the Commission; is in charge of the trial attorneys; is responsible for the prosecution of all cases under the acts; and is the law adviser to the Commission. The Chief Examiner is in charge of the trial examiners, who preside at the taking of testimony in the law cases, and of the investigational examiners, who are charged with the investigation of applications for complaints. Independent of either, but within the Legal Division, is the Board of Review, composed of three members, two of whom are lawyers and one an economist. The functions of the Board will be subsequently described.

The Economic Division is in charge of the Chief Economist and three assistants, and is divided into several sections, each engaged in the investigation of certain of the basic industries and in compiling information and preparing reports thereon.

The Export Trade Division is concerned with the granting of licenses under the Webb Act, with compiling information on the

subject of export trade, and with investigation of complaints of unfair practices in the export trade.

The Enemy Trade Division is engaged in certain duties prescribed by the Trading with the Enemy Act, in respect to licenses to use enemy-owned patents, trade-marks and copyrights.

With the above in mind, the functions of the Commission may be considered under the following heads: (1) Legal (quasi-judicial) functions, (2) Investigative (visitorial) functions, (3) Export Trade, (4) Enemy Patents, Trade-marks and Copyrights.

1. Legal Functions

Quasi-judicial functions are vested in the Commission by Sections 2, 3, 7, 8 and 11 of the Clayton Act and by Section 5 of the Federal Trade Commission Act. Section 2 of the Clayton Act declares price discrimination unlawful, if it tends to restrain trade or create a monopoly; Section 3 forbids "tying contracts,"—that is, contracts which forbid dealing in the goods of a competitor, if the effect of such contract may be to restrain trade or tend to create a monopoly; Section 7 forbids the acquisition of the capital stock of a competitor corporation, if such acquisition have the effect aforesaid; Section 8 forbids interlocking directorates under certain conditions; and Section 11 vests in the Federal Trade Commission the power and duty to prevent these practices in respect to all classes of business engaged in interstate and foreign commerce, except common carriers (jurisdiction vested in the Interstate Commerce Commission) and banks and banking companies (jurisdiction vested in the Federal Reserve Board). Section 5 of the Federal Trade Commission Act declares unlawful "all unfair methods of competition in commerce" (interstate or foreign) and vests in the Federal Trade Commission the power and duty to prevent them.

The method of preventing violation of any of these sections is substantially the same under both acts, with one exception. Section 11 of the Clayton Act declares that—

> "Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven, and eight of this act, it shall issue and serve upon such person a complaint stating its charges in that respect, and con-

taining a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint."

Section 5 of the Federal Trade Commission Act declares that—

"Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, *and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public,* it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint."

The essential difference is, that, in the case of the Clayton Act, whenever it shall appear to the Commission that the Act has been or is being violated, it is mandatory that the Commission proceed; whereas, under the Federal Trade Commission Act, it is discretionary with the Commission that it act, and it will only do so if such a proceeding would be to the public interest. The importance of this feature will be discussed later.

So much for the statutes. What is the actual procedure? How does the Commission come by, acquire or secure "reason to believe" that there is or has been a violation of the acts? How does it determine that a proceeding under Section 5 "would be to the interest of the public"? Of what nature is its complaint? How and by whom is such complaint prepared? Must the complaint allege the offense in general or in particular terms? How is the complaint served? Are answers permitted, and if so, of what sort? What sort of "hearing" is had? How is the testimony secured? What are the "findings of fact"; how are they prepared and by whom? These are all matters of administrative regulation and practice, and nowhere appear in the statutes. But they are practical matters, and a knowledge of them will be of value to the practitioner and the business man.

In the great majority of cases, the attention of the Commission is directed to alleged violations of the Clayton Act or Federal Trade Commission Act by complaints from aggrieved parties. Usually, it is the injured competitor, although occasionally a trade association will complain in the interest of one or more of its members. These complaints are informal; usually letters from the aggrieved parties,

or their attorneys, addressed to the Commission or its chairman or secretary. *In all cases,* they are referred to the Chief Examiner's office, where each is entered as an "application for formal complaint," given an "application file number" and assigned in its order for investigation.

The investigation is conducted under the direction of the Chief Examiner by the investigational examiners, who call upon, or correspond with, all persons likely to furnish information of value. To further the progress of this work, the Commission maintains three branch offices, in New York, Chicago and San Francisco. Applications for complaint can be, and often are, filed at the branch offices, from which they are referred to the Chief Examiner's office.

The investigation completed, the examiner in charge files with the Chief Examiner a written report, setting up the facts disclosed by the investigation, with a recommendation either that formal complaint issue or that the application be dismissed. Particular care is had in the investigation to determine whether the transactions involved are in interstate or foreign commerce, and the examiner's report must show this jurisdictional fact. If the examiner believes the matter not of public interest, this must be shown in the report.

The examiner's report is personally examined by the Chief Examiner or the Assistant Chief Examiner, and if not approved, is assigned to another examiner for further investigation. If approved, it is forwarded to the Board of Review. As a rule, if the Chief Examiner approves the report, he also approves the examiner's recommendation; but the Chief Examiner may, and occasionally does, approve the report of the facts, but disapprove the recommendation.

In the office of the Board of Review, the report is assigned by rotation to one member of the Board. He reviews the reports of interviews, the correspondence, exhibits, etc, and prepares a synopsis of the facts of the case and of the law applicable thereto. This is considered by the whole Board and they make a recommendation, either for complaint or dismissal. This recommendation may or may not be in accordance with the recommendation of the examiner. The entire file, consisting of application for complaint, reports of the interviews, exhibits, the examiner's report, the Chief Examiner's endorsement, and the report and recommendation of the Board of Review, is then forwarded to the Commission.

The Clerk of the Commission assigns the application files by rotation to one of the Commissioners. Such Commissioner examines the entire file and usually enters a written recommendation. This is customarily a mere memorandum, approving or disapproving the report of the Board of Review; but may be a review of the entire case. The application then comes before the full Commission for action. A majority of the Commission decide the question. If the application is dismissed, a journal entry of such action is made, a copy of which is put in the file of the case and the entire file then deposited in the Docket Section. Such file is not a public record and cannot be examined, except upon authority from one of the Commissioners. The applicant is usually notified by the secretary of the action taken by the Commission. If the application is granted, a journal entry is made that a formal complaint issue, and the file is referred to the Chief Counsel's office for preparation of the formal complaint.

The meetings of the Commission in respect to applications for formal complaint are not open to the public. No record of such proceedings is kept, other than the journal entries made by the Clerk of the Commission. If one or two Commissioners dissent to a formal complaint ordered by the majority, this fact is not disclosed and no entry is made of it, other than the journal entry.[3]

It is worthy of note that more than half of the applications for formal complaint have been dismissed by the Commission at this stage,—most of them for the reason that the investigation disclosed no cause of action, lack of jurisdiction in the Commission, or want of public interest. Equally important is the fact that at no time

[3] There have been exceptions to this; notably, in the case of the application for complaint against the United States Steel Corporation et al. in respect to the "Pittsburg Plus" system. In this case, the Commission not only made extensive investigation through its examiners but conducted a series of public hearings at which representatives of the steel industry from all parts of the country presented arguments for and against the proposed complaint. The Commission voted three to two for dismissal of the application. In view of the importance of the case and the publicity which had attended it, it was deemed best to publish the positions taken by each of the five Commissioners. Also the complaint issued August 31, 1922, against the Midvale-Republic-Inland steel merger, in which Commissioner VanFleet (recently appointed by President Harding, and the only representative of the present administration on the Commission) dissented, no reason being stated.

prior to service upon him of the formal complaint can the party complained of appear and enter any formal defense, denial, or explanation. Indeed, he may not even know that he is being investigated, because the investigational examiners do not necessarily attempt to get any information from the party investigated. If such party learns of the investigation he may send such communication as he pleases to the Commission, and it will be entered as part of the investigational file and duly considered with the other material therein. Prior to the issuance of a formal complaint, the investigation is not even an *ex parte* proceeding,—the complainant can merely present his evidence and cannot direct or affect the progress of the investigation. The Commission has held, and rightly, that the proceeding is in the interest of the public, not of the complainant; and, until it has reason to believe, from the evidence obtained, that there has been a violation of one or more of the acts, and issues a formal complaint charging such violation, no one is directly interested, except the Commission, itself. Not a few instances have occurred where the complainant has had a change of heart, and sought to have the investigation quashed by a withdrawal of its application. The Commission has never permitted this. There have also been instances where the party complained of has appeared at the Commission's office in Washington, accompanied by counsel and determined to end the proceeding then and there by a showing of his defense. The Commission has always listened courteously to these gentlemen, but has never stopped the proceedings.

The formal complaint is prepared in the Chief Counsel's office, by one of the members of the trial staff. On approval by the Chief Counsel, the draft of the complaint is referred to the Commission. It is usually first examined by the Commissioner to whom the application file was assigned. When the form of complaint is approved by the Commission, it is ordered issued. The proceedings, in which the complaint is considered, are closed to the public and no record is made of them, other than a journal entry.

The formal complaint is nominally served upon the party defendant (termed the "respondent") by the secretary; but in actual practice, service is made by the Docket Section. The statutes[4] provide that service may be made by registered mail, and that the post office

[4] Section 5, Federal Trade Commission Act; Section 11, Clayton Act.

return receipt card shall constitute proof of service.[5] The Docket Section assigns a new number to the case, known as the "formal docket number," and, commencing with the resolution of the Commission that formal complaint issue, and with the complaint, the docket file becomes a public record. The answer of respondent, transcript of testimony, exhibits, findings of the examiner and orders of the Commission are all made a part of this file, and are open to public inspection.

The Commission may, and sometimes does, order complaint issued on its own initiative and at the instance of no one. The Commission, in the course of its investigational work under the Economic Division, and also in the course of the investigations made by the Chief Examiner's department, discovers trade abuses, concerning which no complaints have reached them, but which they deem should be prohibited. These cases are docketed, as application files, and go through the same routine as other applications for complaint.

This is how the Commission "has reason to believe" that the Clayton Act or Federal Trade Commission Act is being violated. In the case of violations of the Federal Trade Commission Act, the Commission must also determine that the issuance of a formal complaint and proceedings thereunder "would be to the interest of the public." This determination is informal, and the fact that the Commission orders a complaint issued is of itself a determination that the proceedings are in the public interest.

The form of the complaint is instructive:

"The Federal Trade Commission, having reason to believe from a preliminary examination made by it, that ..... of ....., hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce in violation of Section 5 of the Act of Congress, approved September 26, 1914, entitled, 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' (or Section 2, 3, 7 or 8 of the Clayton Act) and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues

[5] The statutes further provide for personal service on the respondent, or service by leaving a copy of the process at the principal office or place of business of respondent. Service by registered mail is used in practically all instances.

this complaint, stating its charges in that respect, on information and belief, as follows:

(Here recite the charges.)

"Therefore, notice is given you, the said ....., that the charges of this complaint will be heard by the Federal Trade Commission at its office in the City of Washington, D. C., on the ..... day of ....., 192.., at 10:30 o'clock in the forenoon of that day, or as soon thereafter as the same may be reached, at which time and place you shall have the right to appear and show cause why an order should not be entered by the Federal Trade Commission, requiring you to cease and desist from the violation of law charged in this complaint.

"And you will further take notice that within 30 days after the service of this complaint, you are required to file with the Commission an answer in conformity with Rule III of the Rules of Practice before the Commission.

"In witness whereof, the Federal Trade Commission has caused this complaint to be issued, signed by its Secretary, and its official seal to be affixed hereto at the City of Washington, D. C., this ..... day of ..... A. D. 1922.

"By the Commission.

.....
Secretary."

It will be noted that the language of the statutes is closely followed, and all essential jurisdictional elements averred. The charges of the complaint must plainly allege facts sufficient to constitute a violation of the statutes, failing which there is no foundation for an order, and, when challenged, such order will be set aside by the courts.[6]

The hearings before the Commission are held at Washington, D. C. The complaint states that the day of hearing will be forty days from the date of the complaint; as a practical matter, however, the Commission does not and cannot hold the hearing at that time. The respondent has thirty days in which to answer, which would leave but ten days for the trial of the cause, preparation of briefs and oral argument. The actual practice is that a supplementary

[6] Federal Trade Commission v. Gratz, 253 U. S. 421.

notice is served with the complaint, advising the respondent that, while the thirty-day period for answering will be strictly adhered to, the date of hearing is nominal only and no hearing will be actually had upon that date, but the respondent will be seasonably advised of all proceedings after his answer is filed.

Answer may be made by the respondent in person or by attorney, and three copies of the answer are required. Notices of appearance by counsel are not necessary and are not usually filed. Motions for bills of particulars are not honored, the Commission having taken the position that the complaint sufficiently advises the respondent of the nature of the charge against him, and in case he is taken by surprise during the course of the trial, he will be allowed a continuance to meet the facts brought against him.

After the complaint has been issued, the case is assigned by the Chief Counsel to one or more members of the trial staff for trial. As soon as the docket of the trial attorney will permit, the case is set for trial. The Chief Examiner assigns a trial examiner to the case, and a formal order, appointing the designated trial examiner to hear and receive testimony and evidence in the case, is passed by the Commission as a routine matter. Notice is then served on the respondent, or his attorney, of the times and places of the taking of testimony. Such notice must be served not less than five days before the first day of the trial, and service is made by registered mail in the same manner as service of the complaint. The respondent is required to put in his case directly after the close of the case for the Commission. The respondent may by stipulation of counsel, or on application to the Commission, secure a continuance for cause, either of the whole hearing or of his own case.

The Federal Trade Commission Act (Section 9) vests power in the Commission to issue *subpoenas* and *subpoenas duces tecum.* These must be signed by a Commissioner and bear the seal of the Commission. The trial attorney secures service of these through the Docket Section. Service is made by registered mail, as provided by the statutes.[7] With the notice of trial, respondent is advised that he may secure the Commission's *subpoenas,* to secure attendance of witnesses in his defense, on application to the Secretary of the Commission. The same witness fees and mileage are allowed as in

[7] Federal Trade Commission Act, Section 5; Clayton Act, Section 11.

federal district courts. The respondent must pay the fees and mileage of all witnesses called by him.

The testimony is taken at such place or places as are most convenient and expedient for all concerned. The trial examiner presides and the practice before him is quite similar to that before a master in chancery. The proceedings may be adjourned from time to time and from place to place at the direction of the trial examiner. Testimony is taken by the official reporter and reduced to a typewritten record, copies of which may be secured by the respondent and any interested person by arrangement with the reporter.

The Commission has taken the position that, in ascertaining the facts to be included in its findings, it is not bound strictly to observe the common law rules of evidence. The practice has not been uniform, but it may be said that, generally, the examiner will not exclude any evidence offered, unless it is scandalous, frivolous or so patently unrelated to the issue as to be totally inadmissible. The examiner does not otherwise rule upon the evidence, which is admitted subject to objection. The Commission, in theory at least, rules upon the evidence, and counsel may renew objections at the time of argument; however, so far as the writer is aware, the Commission has never specifically ruled on any such objection, nor ordered any evidence stricken from the record. It should be observed, however, that while the Commission exercises quasi-judicial powers, it is an administrative body. Like the Interstate Commerce Commission, the Land Office, the Post Office Department, the Internal Revenue Bureau, and other administrative departments of the government with quasi-judicial powers, it need not follow the forms of a judicial trial in ascertaining the facts upon which its administrative order rests.

Section 9 of the Federal Trade Commission Act provides that by order of the Commission testimony may be taken by deposition at any stage of any proceeding or investigation under the act, before any person designated by the Commission and having power to administer oaths. This has been done in only two instances.[8] Sec-

[8] In one case an order was issued to take depositions before certain of the United States Consuls in South America. In the other a deposition was taken in New York City to preserve the testimony of a witness about to leave the United States, with no immediate intention of returning within the jurisdiction.

tion 5 of the Federal Trade Commission Act and Section 11 of the Clayton Act provide that in all legal proceedings before the Commission, any person, partnership or corporation may, on application to the Commission, and on good cause shown, be allowed to intervene and to appear in said proceedings either in person or by counsel.

On receipt of the official record, the trial examiner has fifteen days in which to prepare and file proposed findings of fact and order. The proposed findings and order are served upon the trial attorney and counsel for the respondent, who have fifteen days to file exceptions thereto. If no exceptions are filed, they are considered waived. The trial examiner, with the findings and order, also serves notice of the time for filing of briefs, if counsel desire to submit them. Twenty copies of briefs must be filed with the Secretary, together with proof of service on the opposite party.

The entire record, consisting of the complaint, answer, transcript of the testimony, exhibits, proposed findings and order of the examiner, and exceptions thereto by counsel, is then presented to the Commission. The Clerk of the Commission, on application of counsel, sets the cause for hearing; and notice of the time and place (Washington, D. C.) is duly served on respondent. Such time is usually arranged by consent of counsel, but the trial attorney may, if counsel for respondent be unduly dilatory, note the cause for hearing at such time as the Clerk shall direct. Counsel for respondent can then secure a continuance only by application to the Commission and for good cause shown.

At the hearing oral argument is had before at least three members of the Commission. Exceptions to the trial examiner's findings and proposed order must be noted in the briefs and raised in the oral argument. The Commission reserves decision until it can consider the record and briefs. The case is usually considered by one of the Commissioners, who makes a recommendation to the whole Commission, which, by majority vote in regular meeting, fixes upon the form of the findings of fact and the appropriate order. A formal order is entered, either dismissing the complaint or commanding the respondent to cease and desist from the practice complained of. This order is served upon the respondent in the same manner as the complaint.

The formal complaint files are public records, and mimeographed

copies of complaints, answers, findings and orders may be secured upon application to the Docket Section. Trials before the examiners and hearings before the Commission are open to the public The formal order disposing of the cause is a part of the public record, but the meeting of the Commission at which it is entered is not open to the public, nor is any record kept of the action of the individual Commissioners in respect to the order, other than a jour nal entry.

Such is the procedure upon full trial and hearing. Counsel may submit the case on briefs without argument, or on argument with out briefs, or on the record alone. Counsel may also agree to submit on an agreed statement of facts, in which case no trial is had. This method is often employed. The respondent may also agree to take what is in effect, although not in name, a consent decree. The Commission, however, insists upon a record, and in every case of consent decree, an agreed statement of facts must be filed, or testimony taken. In the event that a consent decree is entered, no trial examiner is appointed and the trial attorney himself, under the direction of the Chief Counsel, prepares the findings of fact and the appropriate order to cease and desist.

The Commission has an unwritten rule that, once formal complaint is issued, the case cannot be dismissed without the facts being ascertained by trial or agreed statement filed. It has another unwritten rule that motions to dismiss will not be considered, except at the hearing upon the merits, when the Commission will pass upon both the motion and the merits. Neither rule has been invariably followed. In the case of the first, the Commission has dismissed a few cases, after complaint and answer and before a record was made up; but in every such case it was upon motion of the Commission's attorney, and a new or amended complaint was issued in respect to the same matter.[9] To the second rule two or three exceptions must be noted, where counsel for respondent were allowed to

[9] Note an exception to this where the Commission, by order of July 25, 1922, dismissed 39 complaints, in cases involving resale price maintenance and on the suspense calendar pending appeal to the United States Supreme Court in the Beechnut Packing Co. case (see 42 Sup. Ct. Rep. 150), without prejudice to commence new proceedings in the same matter, the Chief Examiner being directed to investigate and report as to present violations of law.

present and argue motions to dismiss before the case was heard on its merits.[10]

The Commission has dismissed relatively few cases in which formal complaints have been issued. The grounds for such dismissal have generally been failure of proof, want of jurisdiction, or want of public interest. The Commission has another unwritten rule, to the effect that it will not dismiss a complaint merely because the respondent has voluntarily ceased the practice complained of. However, this rule has been as often honored in the breach as in the observance, and the Commission's action in this respect has not always been founded on good reason. Under the statute, the Commission has power to enter an order to cease and desist as well for past violations as for present.[11] A distinction has been suggested between cases where the respondent voluntarily ceased the practice complained of before the complaint issued, and those where respondent ceased after the complaint issued. This distinction is arbitrary and inequitable, for if dismissal depended on promptness in stopping the condemned practice, the test would be whether respondent

[10] Notably Docket No. 606, Federal Trade Commission v. The Mennen Co., in which motion to dismiss was presented by Mr. Gilbert Montague, after issue was joined and proofs taken; and Docket 694, Federal Trade Commission v. Chamber of Commerce of Minneapolis, in which motion to dismiss for want of jurisdiction was presented by Mr. David F. Simpson, as part of the answer of respondent, and before any proofs were taken. From the Commission's order denying the motion in the latter case respondent forthwith sought to review the order by certiorari to the U. S. Circuit Court of Appeals, Eighth Circuit. Certiorari was denied, March 27, 1922, 280 Fed. 45, on the ground that the jurisdiction of the circuit court of appeals is limited by the statute to review of final orders of the Commission, and does not include the power to stay the Commission's proceedings pending final order, either on the question of its jurisdiction or otherwise.

[11] Expressly confirmed by the U. S. Circuit Court of Appeals, Seventh Circuit, in Sears, Roebuck & Co. v. Federal Trade Commission, 258 Fed. 307, in which it was said:

"Petitioner (Sears, Roebuck & Co.) insists that the injunctional order was improvidently issued because, before the complaint was filed and the hearing had, petitioner had discontinued the methods in question, and, as stated in its answer, had no intention of resuming them. * * * But respondent (the Commission) was required to find from all the evidence before it what was the real nature of petitioner's attitude. * * * No assurance is in sight that petitioner, if it could shake respondent's hand from its shoulder, would not continue its former course."

stopped as soon as possible after he learned the Commission condemned the practice. The real truth is, that in nearly if not all of the cases so dismissed counsel for the Commission were convinced that the respondent had acted in good faith, had permanently discontinued the practice condemned, and that further proceedings could accomplish no more than had already been voluntarily done by the respondent, and would not, therefore, be to the public interest. Being so convinced, the Commission's attorney moved that such complaint be dismissed; for it is the province and duty of the Chief Counsel, through his trial attorneys, to recommend dismissal of cases which are not sustained by the proofs or which should not be maintained.

There can be no question but that the respondent can dispute the jurisdiction of the Commission in respect to interstate or foreign commerce. The Commission has jurisdiction only if the respondent be engaged in interstate or foreign commerce,[12] or if his business, though intrastate, places such a direct burden, hindrance or discrimination upon the interstate traffic of his competitors as to justify federal control of purely intrastate business.[13] Whether the respondent can dispute the public interest in his case, either before the Commission or in the courts, is a disputed question. It would seem that the determination of public interest is an administrative function only, not open to judicial review, except, perhaps, where such determination is so arbitrary as to be beyond the powers of the Commission and to work a denial of due process. The statute condemns *all* unfair methods of competition, just as the Sherman Act condemns all restraints of trade. It would be impracticable, if not impossible, to prevent all instances of unfair competition, and the statute gives the Commission an administrative discretion to prosecute only those violations of the act which are of sufficient concern to the public to warrant governmental interference.[14] The Commission has never made an expression of policy in respect to the

[12] Ward Baking Co. v. Commission, 264 Fed. 330; D. A. Winslow v. Commission, Norden Ship Supply Co. v. Commission, 277 Fed. 206.

[13] Canfield Oil Co. et al. v. Commission, 274 Fed. 571; Minnesota Rate Case, 230 U. S. 352; Shreveport Rate Case, 234 U. S. 342.

[14] But see New Jersey Asbestos Co. v. Federal Trade Commission, 264 Fed. 509, and Federal Trade Commission v. Gratz, 258 Fed. 314, in which the U. S. Circuit Court of Appeals, Second Circuit, held that "Only unfair

question, although it has denied the right of the courts to review its holding in that respect, in the briefs and arguments of its counsel in certain cases appealed to the circuit courts of appeals. As a practical matter, respondents do raise the question, both before the Commission and in the courts.

Trade Practice Submittals

Attention should be called to the procedure known as trade practice submittals. These are not provided for in the statutes, and are not in the nature of adversary proceedings; but interested parties usually appear therein with counsel. In the case of certain trade customs or practices, the Commission has had occasion, by reason of the number of applications for complaint involving the same practice, the number of persons complained of, the prevalence of the practice in the trade in question, and the conflicting views of persons interviewed in respect thereof, to submit the matter to the trade itself. Notices are served upon members of the trade or industry, all associations connected therewith, and any other interested persons, that the matter will be considered by the Commission at a conference to which all interested are invited. At such conference a member or representative of the Commission presents the question, outlines the different expressions of opinion that have been presented to the Commission and calls for a further expression of opinion and general discussion. Following this, the representative of the Commission announces that he will withdraw, and leave the members of the trade to agree upon and prepare suitable resolutions in respect to the alleged illegal practices, these resolutions to be in the nature of an agreement by those signatory thereto to observe the terms thereof in respect to their individual businesses. He further states that the

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practices which affect the public, as distinguished from individuals, are within the jurisdiction of the Commission."

The Gratz case was appealed to the Supreme Court, but the decision there does not touch on this question (Federal Trade Commission v. Gratz, 253 U. S. 421). The New Jersey Asbestos case was never appealed, and is a final adjudication, at least in the second circuit. However, the question was stated to be an open one (though not decided) in the U. S. Circuit Court of Appeals, Third Circuit, in Gulf Rfg. Co. et al. v. Commission, — Fed. —, July 14, 1922 (not yet reported). See also Federal Trade Commission v. Winsted Hosiery Co., 42 Sup. Co. 384.

Commission does not bind itself to accept the result; but will, if the resolutions seem fair and appear to do away with or render harmless the practice complained of, accept the result as a standard of conduct to be enforced against all in the same trade or industry.

The Commission's representative having withdrawn, those present agree, if they can, on a standard of conduct to be observed by themselves and recommended for all in the same trade. Suitable resolutions are prepared and signed by the members of the trade. These are then presented to the Commission.

This procedure is of recent development, and has met with considerable success. It has been accepted in good part by the members of the industries appealed to, and, with one exception,[15] the results of the submittals have been substantially accepted by the Commission.

Jurisdiction of the Courts Over the Commission

No case has ever arisen in which the jurisdiction or action of the Commission has ever been questioned in a state court, although the Federal Trade Commission Act has been the subject of adjudication in a state court.[16] The federal courts, however, have had occasion many times to pass on different phases of the Commission's action.

In the first place, both the Clayton Act and the Federal Trade Commission Act provide expressly that the Commission can enforce its orders only by appeal to a United States circuit court of appeals. Similarly, any party required by an order of the Commission to cease and desist from any alleged unfair method of competition or violation of the Clayton Act may obtain a review of such order in a circuit court of appeals by filing a written petition, praying that the order be set aside. It was the belief of those members of Congress, who framed the act, that since the Commission had been vested with such wide and extraordinary powers to investigate and condemn, individual rights could only be properly safeguarded by depriving the Commission of the power of execution of its decrees.

[15] The trade practice submittal in respect to the use of the word "Sheffield" as a descriptive trade name for silver-plated hollow-ware. Result of the submittal not accepted—Statement of the Commission, March 17, 1922.

[16] Quincy Oil Company v. Sylvester, March 7, 1921, 130 N. E. (Mass.) 217.

Such power was vested in the United States circuit courts of appeals for the double purpose of providing a judicial review of the Commission's proceedings (whereby due process of law could be assured the party proceeded against) and a speedy and final adjudication of the questions of law involved.

The statutes provide that the Commission may appeal to the circuit court of appeals within any circuit where the method of competition in question was used (or the violation of the Clayton Act complained of committed) or where the party complained of resides or carries on business. The Commission shall certify and file with its application a transcript of the entire record in the proceedings, including all the testimony taken and the report and order of the Commission.[16a] Upon filing of the application and transcript, notice shall be served upon the respondent, and thereupon the court shall have jurisdiction of the proceedings and of the question to be determined therein. The court has power, upon the pleadings, testimony and proceedings set forth in the transcript, to make and enter a decree, affirming, modifying or setting aside the order of the Commission. The findings of the Commission as to the facts, if supported by testimony, are conclusive.

At any time prior to the filing of the transcript the Commission may modify, amend or set aside, in whole or in part, any report or order which it has made. After the transcript has been filed, either party may apply to the court for leave to adduce additional evidence. On good cause shown the court may order such additional evidence taken; same to be taken before the Commission, on such terms as to the court seem proper. The Commission may then modify or make new findings of fact, and may recommend that its original order be modified or set aside.[17] Such additional or modified findings as to the facts, if supported by testimony, shall be conclusive.

[16a] This was construed by the Circuit Court of Appeals, Sixth Circuit, in National Harness Mfrs. Assn. v. Federal Trade Commission, November 15, 1919, 261 Fed. 170, to mean that the transcript need not necessarily be filed in full, but that it could be revised and condensed, following the analogy of general equity rule 75 (198 Fed. xl), and a condensed narrative of the material parts of the testimony made, as agreed upon by the parties under the direction of the court.

[17] See Federal Trade Commission v. Winsted Hosiery Co., 42 Sup. Ct. 384.

In case the respondent appeals, a written petition, praying that the order of the Commission be set aside, is filed in the circuit court of appeals in any circuit, as aforesaid. A copy of the petition shall be forthwith served upon the Commission, and the Commission shall thereupon certify and file a transcript of the record. Thereafter the proceedings are in like manner as in the cases of appeals by the Commission.

The statutes declare that the jurisdiction of the circuit courts of appeals to enforce, set aside or modify the orders of the Commission shall be exclusive and final, except that it shall be subject to review by the Supreme Court upon certiorari, as provided in Section 240 of the Judicial Code. The proceedings in the circuit courts of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited.

It may be remarked that the circuit courts of appeals have not been slow to exercise their powers to set aside the orders of the Commission. Out of twenty-one decisions of the circuit courts of appeals, the orders of the Commission were sustained in five and reversed, in whole or in part, in sixteen.[18]

What is an "unfair method of competition" is a question of law. The words are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine as a matter of law what they include.[19] It was said in the *Gratz* case that the term was: "Clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."

This pronouncement, although negative in form, has been taken as the criterion of the jurisdiction of the Commission.[20] The effect of this is that it becomes a matter for the Commission in the first

[18] Of these the Supreme Court has passed on but three cases: Federal Trade Commission v. Gratz, 253 U. S. 421, decision in C. C. A. affirmed; Federal Trade Commission v. Beechnut Pkg. Co., 42 Sup. Ct. 150, and Federal Trade Commission v. Winsted Hosiery Co., 42 Sup. Ct. 384, decision in C. C. A. reversed and Commission's order affirmed.

[19] Federal Trade Commission v. Gratz, 253 U. S. 421.

[20] Repeated with approval in Federal Trade Commission v. Beechnut Packing Co., 42 Sup. Ct. 150.

instance, and for the courts ultimately, to determine as a question of law whether any given practice constitutes an unfair method of competition in violation of the act.

Much difficulty has been encountered with the provision that the findings of the Commission as to the facts, if supported by testimony, shall be conclusive. The question at once arises, how much and what sort of testimony must support a finding to make it conclusive; and especially is this question difficult in view of the fact that the rules of evidence are not closely followed in the proceedings before the Commission. In *Curtis Pub. Co. v. Federal Trade Commission,*[21] the circuit court of appeals for the third circuit considered a set of adverse findings of facts, which it strongly disapproved. It acknowledged that it was bound by the findings the Commission had made, but declared it was not bound by the failure of the Commission to find all the material facts which the testimony warranted, and accordingly added a set of findings of its own. The circuit court of appeals for the second circuit has declared that the Commission cannot state, as a finding of fact, what is in reality a mere conclusion of law, and thus make its determination conclusive upon the courts.[22]

An adjudication of the same subject matter or of the same question of law in a litigation between individuals is not necessarily conclusive in an action by the Commission in respect to the same subject matter or question.[23] The litigation between private parties affects only private rights, is *res judicata* only as against the parties or their privies, and can in no way affect the jurisdiction of the Commission, which acts only in the interest of the public. But the circuit court of appeals upon review would give great weight to an adjudication of a trial court involving the same question between private litigants.[24]

On the other hand, the Commission is not limited in its jurisdiction to what has been heretofore considered to be unfair competition in actions between individuals. The circuit court of appeals for the

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[21] 270 Fed. 881.

[22] N. J. Asbestos Co. v. Federal Trade Commission, 264 Fed. 509; Standard Oil Co. of N. Y. v. Federal Trade Commission, 273 Fed. 478.

[23] Curtis Publishing Co. v. Federal Trade Commission, *supra.*

[24] *Ibid.*

seventh circuit said: "The Commissioners representing the government as *parens patriae* are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common law cases."[25]

See, in this connection, *Armstrong Cork Co. v. Ringwalt Linoleum Works,*[25a] wherein the district court dismissed a bill for unfair competition on the ground that the use of the name "linoleum" on a product not theretofore so known and understood did not give a right of action to another who made the genuine article, where it had not been shown that defendant had passed off its goods as those of plaintiff. The circuit court of appeals reversed the lower court and ordered the bill reinstated, but added that such action was made "in view of the possibility of bringing such matters as are here involved before the Federal Trade Commission" and without prejudice to apply for relief to that body. Such application was made and in due course the Commission condemned the practice and ordered the Ringwalt Linoleum Works to cease and desist from the above practice.[26]

Various efforts have been made to prevent the Commission from proceeding under Section 5 of the Federal Trade Commission Act prior to the issuance of any order in such proceedings. Such attempts have not been successful. Injunction to restrain the Commission from proceeding under Section 5 was denied by the United States district court (E. D. Va.) in *T. C. Hurst & Son v. Federal Trade Commission*[26b]; by the circuit court of appeals for the second circuit in *Federal Trade Commission v. Nulomoline Co.,*[26c] and by the Supreme Court for the District of Columbia in *Butterick Co. et al. v. Federal Trade Commission,* August 12, 1921. No opinion

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[25] Sears, Roebuck & Co. v. Commission, 258 Fed. 307; 2 F. T. C. Dec. 536. But see the language of the United States Supreme Court in the Gratz case, 253 U. S. 421, 427.

[25a] 240 Fed. 1022.

[26] 1 F. T. C. Dec. 436.

[26b] 268 Fed. 874, October 2, 1922.

[26c] 254 Fed. 988, August 16, 1918.

filed. The last named decision was affirmed by the court of appeals for the District of Columbia, November 16, 1921.[27]

These decisions must not be confused with the decisions in *Maynard Coal Co. v. Federal Trade Commission,* April 19, 1920 (Supreme Court of the District of Columbia), and *Claire Furnace Company v. Federal Trade Commission,* June 19, 1920 (same court —no opinion filed), in which injunctions were granted to restrain the Commission from exercising certain of the visitorial powers conferred by Section 6 of the Federal Trade Commission Act. These powers and the effect of these cases will be commented upon in another part of this article dealing with the visitorial powers of the Commission. It is sufficient to state that the proceedings, under Section 6 of the Federal Trade Commission Act, are not adversary proceedings but investigations made of and reports required from concerns engaged in interstate and foreign commerce. In the *Claire Furnace Company* case a final decree was rendered March 10, 1922, perpetually enjoining the Commission from requiring such reports, and the case is now pending on appeal before the court of appeals for the District of Columbia.

The above cases should also be distinguished from *Minneapolis Chamber of Commerce v. Federal Trade Commission.*[27a] The latter case has been commented upon, and was an attempt to prevent the Commission from proceeding under Section 5 by petition for certiorari to the circuit court of appeals. Respondent attempted by the

[27] The Butterick Co. case was not without its unusual aspects. On the filing of the bill to enjoin the Commission from proceeding under Section 5, the Supreme Court for the District of Columbia granted a preliminary injunction. The Commission filed a motion to dissolve the preliminary injunction and to dismiss the bill. This motion was denied. Subsequently, the Commission filed an application for rehearing of its motion. This application was granted, but through some peculiar circumstance the Butterick Company was informed of it, but the Commission was not, and did not know of it for some weeks until an article in a trade association magazine, referring to the matter, came to its attention. The matter was then reargued the court reserving decision. Subsequently, and on August 12, 1921, the presiding justice filed a decision dissolving the preliminary injunction and dismissing the bill. No opinion was filed and the justice left for his vacation on the same day. These proceedings were suspended by this court action for over a year and the entire matter was dismissed by the court eventually, without any intimation to either party of its reasons.

[27a] 280 Fed. 45 (C. C. A., 8th Cir., March 27, 1922).

appeal to present questions of law, the determination of which in its favor would deny jurisdiction in the Commission. The court refused to entertain the case before the Commission had entered its final order.

Miscellaneous Legal Powers

Section 7 of the Federal Trade Commission Act provides that in any suit in equity brought by or under the direction of the Attorney General, as provided by the Anti-Trust Acts, the court may, upon the conclusion of the testimony therein, if it shall then be of the opinion that the complainant is entitled to relief, refer such suit to the Commission, as a master in chancery, to ascertain and report an appropriate form of decree. Exceptions to the report may be made and such proceedings had as upon the report of a master in other equity cases. The court may adopt or reject such report in whole or in part. This function of the Commission has never been made use of by the courts. It was called to the attention of the court in *United States v. Eastman Kodak Co.*,[27b] but such action was not considered necessary under the circumstances of the case.

Section 9 of the Federal Trade Commission Act provides that in case of disobedience to a *subpoena* the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. The Commission has availed itself of this provision in but few instances. A recent one occurred during the proceedings against the Utah-Idaho Sugar Company, in which the trial attorney for the Commission was obliged to apply to the United States district court for Utah to compel a witness to testify. The witness thereupon yielded the point and no further action was taken.

The same section of the statute provides that upon application of the Attorney General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this act or any order of the Commission made in pursuance thereof. In *U. S. v. Basic Products Co.*,[27c] the district court held that the Commission was without

[27b] 226 Fed. 62, 81.

[27c] 260 Fed. 472 (W. D. Pa.) 32.

power to demand access to the books and papers of a corporation, manufacturing a patented article by secret process, where the corporation was not alleged to be engaged in interstate or foreign commerce nor charged with unfair competition, but the information was sought only for the purpose of the Navy Department.[28]

Mandamus proceedings were also commenced in the district court for the Eastern District of Pennsylvania[28a] and in the district court for the District of New Jersey.[28b] The proceedings in both of these cases were stayed by the injunctions secured in the *Claire Furnace Co.* case, *supra,* and await decision in that case. The two mandamus cases, the *Claire Furnace Co.* case and the *Maynard Coal Co.* case arise from an attempt by certain coal operators and steel manufacturers to prevent the Commission from requiring reports under Section 6 of the Federal Trade Commission Act. More will be said of these cases under the discussion of the visitorial powers of the Commission.

II. Visitorial and Investigational Powers

It should be remembered that the Federal Trade Commission is in a sense the successor of the Bureau of Corporations, a bureau created during the administration of Roosevelt. The powers and duties of the Bureau of Corporations reflected the attitude of the Roosevelt administration toward the anti-trust question, and its chief function was to compile and publish information regarding the business activities of the principal industries of the country. It was considered at that time that the publication of such information by an impartial governmental agency would sufficiently apprise the public of the conduct of such businesses to prevent the formation

[28] "Counsel for the defendant urge upon this court the necessity of declaring Section 6 of the Trade Commission Act to be unconstitutional, not only 'in so far as it authorizes investigations and compulsory disclosures of matters which are beyond the commerce power of Congress,' but also 'in so far as it attempts to authorize a search or seizure by an administrative agency of the government without charge or suspicion of wrongdoing.' While the contention of counsel *is probably sound,* this court does not deem it necessary to go further than to hold that the Commission have not the power to carry on investigation which they have assumed in the present case." U. S. v. Basic Products Co., *supra.*

[28a] U. S. Bethlehem Steel Co., petition filed June 4, 1920.

[28b] U. S. v. Republic Iron and Steel Co., petition filed June 7, 1920.

of monopolistic combinations. The powers of the bureau were in the main granted to the Commission. The files and records of the bureau were transferred to the Commission, and the employees of the bureau became employees of the Commission.

Section 6 of the Federal Trade Commission Act vests in the Commission its visitorial powers; Section 8 puts the records of all government departments and branches at the disposal of the Commission in aid of such powers; Section 9 provides the manner of enforcement of such powers; and Section 10 provides the penalties for the failure or refusal to submit to the powers so granted.

Section 6 provides that the Commission shall have power:

(a) To investigate all corporations (excepting banks and common carriers) engaged in interstate or foreign commerce, in respect to their organization, business, conduct, practices, management and relation to other persons, associations, partnerships and corporations; and to gather and compile information concerning same.

(b) To require all such corporations to file annual or special reports, furnishing to the Commission such information as it may require of such corporations, in respect to their organization, business, conduct, practices, management and relation to other concerns. Such reports shall be under oath, if the Commission so requires, and shall be filed within such reasonable time as the Commission may prescribe.

(c) To investigate, on its own initiative or upon the application of the Attorney General, the manner in which a final decree, entered against any corporation in a suit brought by the United States under the anti-trust acts, has been or is being carried out by such corporation. Upon such application of the Attorney General it shall be the duty of the Commission to make such investigation. It shall transmit to the Attorney General a report of its findings and recommendations, which report shall be made public in the discretion of the Commission.

(d) To investigate and report the facts relating to any alleged violations of the anti-trust acts by any corporation, upon the direction of the President or of either House of Congress.

(e) Upon the application of the Attorney General, to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the anti-trust acts,

in order that such corporation may thereafter maintain its organization and conduct its business in accordance with law.

(f) To make public such information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; to make annual and special reports to Congress and therewith recommendations for additional legislation; and to publish its reports and decisions in the form and manner best adapted for public information and use.

(g) To classify corporations and make rules and regulations for the carrying out of the provisions of this act.

(h) To investigate trade conditions in and with foreign countries, where conditions may affect the foreign trade of the United States; and to report to Congress thereon with such recommendations as it deems advisable.

A consideration of all these powers leads to the realization that the Commission has been vested with a visitorial power over corporations engaged in foreign and interstate commerce tremendous in its scope. There are few concerns, indeed, that have business of any consequence today that does not take them across state lines and subject them to this power.

It would extend this article unduly to relate at this time the many investigations conducted by the Commission and reports filed in pursuance of this section of the act. It is sufficient to state that they have been of great consequence. One instance may be cited.

Early in its history, the Commission had occasion to investigate alleged illegal combinations among the great packers, particularly in Chicago. The proceedings which this involved ran over a period of several years and resulted in several reports to the Department of Justice and to Congress. The investigation tended to show an unlawful combination and restraint of trade on the part of the "Big Five" —Swift & Co., Armour & Co., Morris & Co., Wilson & Co., and The Cudahy Packing Co. The evidence was submitted to the Department of Justice in 1918. In 1919, a criminal prosecution was ordered by the Attorney General and preparations were made to submit evidence before a federal grand jury. The packers entered into negotiations with the Attorney General looking toward a consent decree. On February 27, 1920, a consent decree was entered in the Supreme Court of the District of Columbia against the five

principal corporations, certain of their subsidiaries and certain individuals (*U. S. v. Swift & Co. et al.*, in Equity, No. 37623). The Commission also issued formal complaints against the five companies named, alleging violations of the Clayton Act and Federal Trade Commission Act. The defendants in the equity suit submitted a proposed plan of compliance with the decree. The Commission, on its own initiative (under Section 6 (c) of the act), investigated such plan, and reported to the Attorney General that the plan would not secure the objects sought by the suit. These objections were presented to the court by the Department of Justice, and the defendants withdrew their plan. Subsequently a second plan was filed by the defendants, which was referred to the Commission by the Attorney General. This was likewise rejected by the Commission and objected to by the Department of Justice; and on January 4, 1921, the court rendered a decision sustaining the objections. Subsequently other plans were submitted by defendants, one of which was accepted by the court on February 24, 1921. The Commission objected to this as well, and filed a report with the Attorney General setting forth its objections, but the Attorney General refused to take further action.

The matter did not rest here, however, because Congress had been aroused by the disclosure of the tremendous power of the packers. Various bills and resolutions had been introduced from time to time since 1918, and the whole business of the stockyards and meat packers was brought under government regulation by the "Packers and Stockyards Act, 1921" (Aug. 15, 1921, Ch. 64; 42 Stat. 159). Those who followed the course of that act while it was pending in Congress will know that it was uncertain until the last whether the power to control the meat packing industries would be vested in the Federal Trade Commission or in the Secretary of Agriculture. The act,[29] as passed, placed such power in the Secretary of Agriculture, and took from the Commission jurisdiction over all matters which by the act were made subject to the jurisdiction of the Secretary.[30]

[29] The act closely follows the procedure prescribed under Section 5 of the Federal Trade Commission Act and Section 11 of the Clayton Act.

[30] Section 406 of the act provides:

"That the Federal Trade Commission shall have no power or jurisdiction so far as relating to any matter which by this act is made subject to

Turning now to the sections of the Federal Trade Commission Act in aid of Section 6, we find the following:

By Section 8 of the Federal Trade Commission Act, the several departments and branches of the government, when directed by the President, shall furnish the Commission all records, papers and information in their possession relating to any corporation subject to any of the provisions of the act, and shall detail from time to time such officials and employees to the Commission as the President may direct.

Enforcement of the powers granted by Section 6 is secured by Section 9, which provides that the Commission or its agents shall at all reasonable times have access to and the right to examine and copy any documentary evidence of any corporation being investigated or proceeded against; and to require by *subpoena* the attendance of witnesses and the production of documentary evidence relating to any matter under investigation. Such attendance of witnesses and production of documentary evidence may be required from any place in the United States at any designated place of hearing. In case of contumacy or refusal to obey a *subpoena* any United States district court in the jurisdiction in which such inquiry or proceeding is being carried on may issue an order to compel obedience; and failure to obey such order may be punished as a contempt of court.

Upon application of the Attorney General of the United States, at the request of the Commission, the United States district courts shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of the act or any order of the Commission made in pursuance thereof.[31]

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the jurisdiction of the Secretary (of Agriculture), except in cases in which before the enactment of this act complaint has been served under Section 5 of the (Federal Trade Commission Act), or under Section 11 of the (Clayton Act), and except when the Secretary of Agriculture in the exercise of his duties hereunder shall request of said Federal Trade Commission that it make investigations and report in any case."

[31] In Chamber of Commerce of Minneapolis v. Federal Trade Commission, 280 Fed. 45, construed to mean "to comply with the provisions" of Section 6 (b), and any order of the Commission in respect thereof (that is, in respect to the filing of annual and special reports by corporations engaged in interstate or foreign commerce), and not to the other provisions of the act.

No person shall be excused from giving testimony or from producing documentary evidence before the Commission on the ground that such testimony or evidence may tend to criminate him or subject him to a penalty or forfeiture. However, no natural person shall be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before the Commission, in obedience to a *subpoena* issued by it. This section, however, does not exempt such person from prosecution and punishment for perjury committed in so testifying.

Section 10 of the act provides drastic penalties for failure or refusal to obey the orders of the Commission. Any person who shall neglect or refuse to attend and testify, or produce documentary evidence, in obedience to a *subpoena* of the Commission, if in his power to do so, shall be guilty of an offense; and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment. Any person who shall willfully make any false entry or statement in any report required under the act, or in any account or record kept by any corporation subject to the act, or who shall fail to make full, true and correct entries in the accounts and records of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter or otherwise falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the Commission or its agents, for the purpose of inspection and making copies, any documentary evidence of such corporation under his possession or control, shall be deemed guilty of an offense against the United States. Upon conviction in any court of the United States, he shall be subject to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for not more than three years, or to both such fine and imprisonment. If any corporation, required by the act to file any annual or special report, fails to do so within the time fixed by the Commission, and such default shall continue for thirty days after notice thereof, the corporation shall forfeit to the United States $100 for each and every day of the continuance of such failure.

To provide for the proper filing, recording and handling of such

confidential information as the Commission must necessarily acquire through these great powers, the statute further provides (Section 10) that any official or employee of the Commission, who shall make public any information obtained by the Commission, without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both fine and imprisonment, in the discretion of the court.

Such are the visitorial powers of the Commission. They are chiefly exercised by the Economic Division, although to some extent the investigational examiners, under the direction of the Chief Examiner, may assist in the exercise of such function. It is not desired to do more than indicate the powers and authority of the Commission in this respect, as most of the investigational work of the Commission does not directly concern members of the profession. However, something should be said in regard to the mandamus cases and injunction cases now pending before the courts, as these are in the nature of test cases, and, if decided adversely to the Commission, will undoubtedly result in similar actions being instituted.

The *Basic Products Co.* case has already been commented on. This decision was rendered in September, 1919. There was strong *dictum* in the opinion to the effect that Section 6 of the Federal Trade Commission Act was unconstitutional and void, but the decision was limited to the holding merely that the Commission was without power to demand access to the books and papers of a corporation not alleged to be engaged in interstate or foreign commerce, nor charged with unfair competition, when the purpose of the investigation showed that trade secrets would be disclosed. The Commission, however, did not concede that this decision in any way curtailed its powers, and in December, 1919, adopted a resolution that it collect and publish from time to time current information in respect to the products and by-products of certain basic industries, including coal and steel. Thereafter the Commission, by written orders, directed certain coal and steel operators to make to the Commission monthly reports of their business, including monthly cost of production, quantity produced, sales and contract prices therefor, orders

booked, and amounts allocated to depreciation and to administrative and selling expenses; and to file quarterly income statements and balance sheets. Certain members of the coal and steel industries refused to obey such orders. Subsequently, the Commission, by other written orders, threatened to impose the penalties provided by law for delay or failure to file such reports. Upon application of the Commission, petitions were filed by the Attorney General in June, 1920, in the United States district courts for the Eastern District of Pennsylvania and the District of New Jersey against certain of the steel operators, praying that writs of mandamus issue to compel the corporations to comply with the Commission's orders. These proceedings were stayed by the injunction secured June 19, 1920, in the *Claire Furnace Company* case, in which two of the defendants to the mandamus proceedings were among the petitioners. The *Claire Furnace Company* case and the *Maynard Coal Company* case were filed in the supreme court for the District of Columbia. In the *Maynard Coal Company* case the bill prayed that the Commission be restrained from taking steps to collect the penalty imposed on the coal company for failure to file its report. The court held (April 19, 1920) that the visitorial powers of Congress over corporations were far different in the case of ordinary business corporations than in the case of common carriers; that the visitorial power of Congress is limited to that part of the business of a corporation over which Congress has control; and the mere fact that the corporation, engaged in mining, ships a portion of its products to other states does not subject its business of production or its intrastate business to the powers of Congress. The court further held that a court of equity had jurisdiction to prevent, by its writ of injunction, the exaction of the penalties provided by Section 10 of the Federal Trade Commission Act. This case is now pending trial upon the merits.

A similar restraining order was issued by the same court in the *Claire Furnace Company* case on June 19, 1920 (no opinion filed). On March 10, 1922, the final decree was entered in this case, restraining the Commission and all its members, agents, attorneys and employees from in any way attempting to enforce its orders in respect to the reports demanded, and from requiring the companies to furnish any of the information demanded, for the reason that

the Commission could not be constitutionally authorized to demand such reports and information. Appeal to the court of appeals for the District of Columbia was allowed, in which latter court the case is now pending.

III. Export Trade

The functions of the Commission in respect to export trade are chiefly under and by virtue of the Webb Act.[32] This act authorizes the formation of "associations" entered into for the sole purpose of engaging in export trade. These associations are exempt from the anti-trust laws of the United States, except that there shall be, through the association, no restraint of the export trade of any domestic competitor, and no enhancing or depressing of prices or substantial lessening of competition within the United States. Section 1 of the act defines "export trade" and "association." Sections 2 and 3 provide exemptions from the anti-trust laws under the conditions indicated above. Section 4 extends the jurisdiction of the Commission under the Federal Trade Commission Act to "unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States." Section 5 provides that every association which would operate under and by virtue of the act shall file with the Commission a verified statement of its officers, members or stockholders and a copy of its certificate or articles of incorporation or of association, and a copy of its by-laws, and shall file a similar statement on the first day of each year thereafter. It further provides that such corporations shall furnish the Commission such information as shall be required in respect to its organization, business, conduct, practices, management and relation to others. Any association failing so to do shall be deprived of the provisions of Sections 2 and 3 of the act, and shall forfeit to the United States a penalty of $100 for every day of the continuance of such failure. The act further provides that if the Commission shall have reason to believe that any association is engaged in restraint of trade within the United States, or in restraint of the export trade of any domestic competitor of such association, or is engaged in a combination or conspiracy to enhance or depress prices, within the United States,

[32] Also under Section 6 (h), Federal Trade Commission Act.

of the commodities of the class exported by such association, or otherwise to restrain trade within the United States, it shall summon such association and its officers and agents to appear before it and shall investigate the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make recommendations to such association for the readjustment of its business. If such association fail to comply with the recommendation, the Commission shall refer its findings and recommendations to the Attorney General of the United States for such action as he may deem proper. The act further provides that for the purpose of enforcing these provisions the Commission shall have all the powers, so far as applicable, given it by the Federal Trade Commission Act.

At the close of the fiscal year ending June 30, 1921, there were forty-eight associations operating under the act. During that year such associations exported goods to the amount of about $221,000,000. The advantages and benefits to exporters under the act have been many. The economic advantages of joint advertising and selling and the pooling of administrative expenses are apparent. Pooling of orders among the several members, elimination of many varieties and grades of goods for which there is no demand abroad, the adoption of uniform brands and trade-marks, and the adoption of standardized and improved packages may be mentioned as some of the results obtained.

In addition to its work under the Webb Act, the Commission has investigated over fifty complaints against American concerns, involving practices injurious to American foreign trade. In some the complaints have been found to be unwarranted and the report of the Commission has served to exonerate the accused concern of unjust charges. In other cases the trouble has been found to be negligence or lack of understanding of foreign business methods. Satisfactory adjustments have usually been made of these matters. The Commission has been assured by members of the Consular Service that the adjustment of even a small complaint goes far to establish confidence and good will in foreign markets.

A number of other government bureaus are interested, directly or indirectly, in the foreign trade of the United States. To prevent overlapping and duplication of effort a "Liason Committee" has been established, which meets weekly and is attended by representatives

of fifteen government bureaus, including the Commission. This committee serves as a clearing house of current governmental activities in the interest of foreign trade.

Since the World War foreign competitors have combined and concentrated their efforts, with the active encouragement of their respective governments, even to the extent, in some instances, of financial backing and participation. The American trader abroad faces the keenest of competition, and all efforts of our government to advise and assist him are well worth while.

IV. Enemy Patents, Trade-marks, and Copyrights

The Trading with the Enemy Act of October 6, 1917, vested in the President power, which he, by executive order of October 12, 1917, delegated to the Commission, to issue to citizens of the United States and to corporations organized within the United States, licenses to use enemy owned or controlled patents, trade-marks, and copyrights. This legislation was designed to secure to the United States the continued enjoyment of many vital and important inventions long monopolized by alien enemies, particularly Germany, through patents taken out in this country. From the date of the executive order above to the close of the fiscal year, June 30, 1921, the Commission had received a total of 279 applications. Of these, 63 were denied, either because they were based on patents not enemy-owned or for the reason that it did not appear to be in the public interest that the license issue, and 89 licenses were issued, of which 72 were for patents, 4 for trade-marks, and 13 for copyrights.

The Commission's authority to issue licenses ceased with the formal declaration of peace. The alien property custodian had already seized the majority, if not all, of the most important enemy patents, thereby carrying them beyond the jurisdiction of the Commission to license. The jurisdiction over licenses already issued remains, however, in the Commission, except insofar as the liability of the licensees has been terminated by the means provided by Congress.

The last proceeding under the act in which counsel appeared before the Commission was the application, in October, 1920, of the Meadows Oil & Chemical Corporation of New York for the use of the trade-mark "Ichthyol." This name was registered by the Ichthyol Gesellschaft Cordes, of Hamburg, Germany, for certain

medicinal preparations derived from a peculiar deposit of shale found only in the Austrian Tyrol. The applicant sought a license to use the same name for a similar preparation produced in this country. Following denial of the application a hearing was had before the Commission, and counsel for the Meadows Corporation presented an exhaustive review of the subject. The Commission affirmed its action of denial on the ground that it was not shown to be in the public interest to grant the license. In this it followed its expressed policy to grant licenses under trade-mark registration only where the mark is the name of an article covered by patent simultaneously sought to be licensed or the name of an article manufactured under an expired patent.[33]

A discussion of the extraordinary powers exercised by the Commission during the war, by authority of the President or of Congress, would prolong this article unduly. The interest in such matters to present-day readers would be historical only. Neither has it been attempted to trace the growth and development of the Commission's procedure and the practice before it. These have been considered only in their present form. It was not many years ago when the trial attorney drafted the complaint (and often assisted in the investigation), tried the cause, and then drafted the findings of fact and order for the Commission to enter. All this was done away with by the amendment of May 20, 1921, to the Rules of Practice before the Commission; and two independent agencies within the Commission were established, one to try and one to hear the cause. Something might be said in respect of further improvements in the procedure before the Commission; and something, too, in respect to the reasons for the hostility to the Commission evidenced in certain parts of the business world. All of these must await a future writing.†

[33] Only four trade-mark licenses were issued by the Commission,—one to Lehn & Fink, of New York City, for "Pebeco" for tooth paste; one to Anchor Packing Co., of Philadelphia, for "Tauril" for sheet packing; one to the Draeger Oxygen Apparatus Co., of Pittsburgh, for "Pulmotor" for a life-saving apparatus; and one to Abbott Laboratories, of Chicago, for "Veronal" for a sedative. Lehn & Fink subsequently purchased the trade-mark, "Pebeco," from the Alien Property Custodian, and its license was, accordingly, cancelled by the Commission.

† [Mr. Mechem plans to write other articles for the REVIEW, discussing what the Federal Trade Commission has accomplished, its failures, successes and possibilities.—Ed.]